



September 14, 2005

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, NW
Washington, DC 20554

Dear Ms. Dortch:

Re: Petition of Qwest Corporation for Forbearance Pursuant to
47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical
Area, WC Docket No. 04-223

Pursuant to Section 1.1206 of the Commission's rules this will provide notice that on September 13, 2005. William A. Haas, Associate General Counsel, on behalf of McLeodUSA Telecommunications Services, Inc., met via teleconferences with Michelle Carey, Office of Chairman Kevin J. Martin and with Russell Hanser, Office of Commissioner Kathleen Q. Abernathy. McLeodUSA presented views consistent with McLeodUSA's prior submissions in this proceeding.¹

McLeodUSA has invested millions of dollars in network facilities in the Omaha MSA, including 14 collocations, 13 DSLAMs, a Class 5 switch, and a fiber ring connecting McLeodUSA's collocations to its switch. However, McLeodUSA remains dependent on Qwest for the last mile UNE loops to reach all its customers in Omaha. Indeed, under the FCC's *TRRO* rules McLeodUSA is impaired without access to UNE loops from every wire center in the Omaha MSA. Relying on the Act's mandate that ILECs must provide unbundled access to network elements in circumstances when CLECs are impaired, McLeodUSA has a UNE-based business plan for the Omaha MSA. Accordingly, McLeodUSA's very substantial investment in the Omaha MSA will likely be stranded if the Commission grants the Qwest request for

¹ Comments of McLeodUSA USA Telecommunications Services, Inc., WC Docket No. 04-223, filed August 24, 2005; Letter from Andrew D. Lipman, Counsel for Mpower Communications Corp., McLeodUSA Telecommunications Services, Inc., and Pac-West Telecomm, Inc. WC Docket No. 04-223, filed September 13, 2005.

forbearance, and certainly will be in the absence of pro-competitive conditions placed on any forbearance granted to Qwest for this market.²

The proposed forbearance would also seriously harm McLeodUSA's customers in the Omaha MSA. McLeodUSA serves residential and business customers using DS0 UNE loops, some of which are McLeodUSA's largest business customers with multiple locations in the Omaha MSA as well as other locations. McLeodUSA serves more than 100 business customers in Omaha using DS1 loops. While some may be able to make a defensible argument that there is adequate intermodal competition for mass market residential customers,³ no such finding can be supported for business customers, and in particular, business customers served by T1 facilities. While the existence of Cox and Qwest may produce a duopoly of wireline providers, there is no intermodal competition for such customers from wireless or broadband providers. All McLeodUSA customers would lose their preferred service provider if the Qwest petition is granted.

Granting Qwest's forbearance petition will also eliminate the only competition in the local service wholesale market in the Omaha MSA. McLeodUSA is the only alternative provider of wholesale local services to other competitive local exchange carriers in the Omaha MSA market. No provider other than Qwest offers a commercial local wholesale solution to CLECs in the Omaha MSA. The McLeodUSA local wholesale offering combines McLeodUSA local switching facilities with UNE loops leased from Qwest. The McLeodUSA local wholesale alternative has enabled at least one large CLEC to remain in the Omaha MSA market. Granting forbearance will eliminate McLeodUSA's ability to offer this CLEC an alternative to Qwest's QPP. In other words, granting forbearance will give Qwest a monopoly in the local wholesale market. There is no intermodal or intramodal local wholesale alternative for CLECs in the Omaha MSA if forbearance is granted. Thus, in addition to McLeodUSA end users losing service from their selected service provider, this CLEC's customers will also lose their chosen service provider if the Commission grants the forbearance petition.⁴

The Commission also cannot presume that commercial agreements will be made available to CLECs to replace lost access to UNE loops, and certainly not at prices that permit CLECs to remain viable in the market. Cox Telecommunications, Inc. does not offer wholesale access to its last mile facilities to other carriers on a commercial basis. Equally important, there is no track record that Qwest is willing to offer "commercial agreements" to CLECs on

² Even if the Commission limits relief to the Omaha, Nebraska wire centers, such a limitation would be inconsequential to the impact on the viability of McLeodUSA's investment. It is very unlikely that maintaining and operating a local switching facility to support a mere 2 collocations in the Council Bluffs, Iowa central offices would be profitable.

³ McLeodUSA does not agree with such a conclusion since the existence of alternative wireless service has not eliminated the use of landline telephone service for most residential customers. The wireless and broadband alternatives have impacted demand for secondary residential lines.

⁴ The Commission should be aware that the requested forbearance would appear to nullify Qwest's commercial agreements for UNE-P, referred to as Qwest Platform Plus ("QPP"). QPP is made up of the commercially priced switchport in combination with *UNB loops* that the CLEC purchases out of its interconnection agreement under Section 251(c). In other words, granting the forbearance will eliminate all wireline competitors in the Omaha MSA other than Cox, and Qwest will regain thousands of customers that have been used to justify a finding of a competitive market.

reasonable terms for either DS0 or high capacity loop facilities in the absence of regulatory mandates. To the best of McLeodUSA's knowledge, Qwest has not signed any such commercial agreement with CLECs for the Omaha MSA or anywhere else for DS0 or DS1 loops. In fact, McLeodUSA has unsuccessfully tried to obtain a commercial agreement for high capacity facilities with Qwest since it became evident during the *TRO* remand that such an agreement might be required. As evidenced by Qwest's website for commercial agreement solutions, Qwest's "commercial agreement" offering for high capacity facilities is special access. This pricing is unreasonable, and conflicts with a sustainable CLEC business plan in Omaha, which is consistent with the Commission's finding that special access does not eliminate impairment.⁵

Recent history confirms that Qwest is only motivated to offer commercial solutions when trying to persuade regulators that such agreements would be an adequate substitute for unbundling. When the FCC was encouraging RBOCs and CLECs to reach commercial agreements after the Court of Appeals remand of the *TRO*, Qwest offered commercial agreements as a UNE-P replacement in order to induce regulators to eliminate UNE-P in the *TRRO*. Qwest then abruptly announced in January 2005 that it was withdrawing its QPP offering as of January 31, 2005 after the Commission had determined to eliminate UNE P in the *TRRO*. Some CLECs signed the QPP agreements in late January 2005, essentially under duress. Given Qwest's behavior in forcing CLECs to accept QPP or lose access to a UNE-P replacement product, the Commission cannot rely on Qwest as a willing commercial partner for CLECs to replace UNEs in the Omaha MSA. Accordingly, the Commission cannot conclude that commercial agreements are a viable replacement for UNEs, contrary to Qwest's arguments.⁶

For all the reasons previously advanced by McLeodUSA in this proceeding, the Commission should deny the requested forbearance. If, however, the Commission chooses to grant the forbearance to any extent the Commission should do so on a wire center basis, and apply and analyze forbearance on a separate basis for business and residential customers. The Commission should forbear only if (1) 75% or more of customers in the relevant market segment, *i.e.* business or residential, are passed by the facilities of another provider and have a telecom drop installed by the alternative provider; and (2) 75% or more of the access lines in the wire center have been lost to competitors. The Commission should not count as lost lines those lines served by CLECs using UNEs or special access. UNE lines remain ILEC lines for which the ILEC is paid a just a reasonable price as determined by state commissions. Special access lines also remain ILEC lines. Line counts for high capacity lines should not be based on DS1 equivalency, which would unreasonably inflate line counts since one very high capacity circuit to a customer would count as many lines.

⁵ *Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, WC Docket No. 04-313 and CC Docket No. 01-338, F.C.C. 04-290 (rel. Feb. 4, 2005) para. 46.

⁶ Qwest may contend that CLECs were able to obtain QPP after January 31, 2005. However, that does not change the fact that Qwest used its monopoly power to force many CLECs to sign QPP by January 31, 2005. Qwest was unwilling to tell CLECs what commercial alternative, if any, would exist after expiration of Qwest's unilaterally imposed deadline of January 31, 2005. Thus, Qwest essentially forced many CLECs to accept QPP in January 2005 since these CLECs had no other alternative. Forcing CLECs to accept QPP by a date certain without putting forth any other alternative can hardly be called a commercial "negotiation" between two parties when one party is wholly dependent upon the other party for continued existence in the market.

The Commission should also ensure that a forbearance test is adequately conditioned so that CLECs that are impaired under the Commission's rules have genuine alternatives to UNEs. The Commission should require that the ILEC demonstrate that it has entered into a commercial agreement with an unaffiliated facilities-based CLEC in the MSA for last mile DS0 and DS1 loops that is not based on special access pricing.

Sincerely,

/s/ William A. Haas

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